

German supreme court decision on abortion

A contrast to Roe v. Wade

The German Supreme Court tackled the issue of abortion two years after Roe v. Wade, affirming that the unborn have a right to life guaranteed by the constitution, that abortion is "an act of killing", and that the unborn child deserves legal protection throughout its development. The decision is an instructive contrast to Roe because it cuts across the usual categories, and cannot be described as "liberal" or "conservative".

Notably, it said that the state has a duty to use "social, political, and welfare means" to foster developing human life, and that these are preferable to penal measures (though the latter are not ruled out). The decision came several years after decisions in the U.S. and Britain legalized abortion. It struck down a law that legalized some abortions in the first three months.

The decision considered the full range of arguments for abortion, both early (legalization had been a topic of debate in Germany since the turn of the century) and recent (used in other countries such as the United States and Britain that legalized abortion several years before). In particular, it specifically rejected the main points of reasoning in Roe v. Wade as well as its "term solution" as inconsistent with the constitutional guarantee of the right to life.

The part of the German constitution referred to in the decision, Article 1, Paragraph 1, says that "Everyone has the right to life", but does not specifically mention the unborn.

The decision was confirmed after the reunification of Germany, striking down East German laws which permitted abortions under most circumstances.

It should be noted that the decision does not make all abortions illegal. The legislature implemented a system of mandatory counseling which has as one of its goals to present the case that the developing unborn child is an independent human life. However, no legal sanction is applied in the first 3 months of

pregnancy if the counseling is completed and the abortion is performed. Despite some of the reasoning contained in the decision, this system has not been found by the court to conflict with the constitution. Some abortions are therefore de facto legal. A significant number still occur, but the incidence per capita is about one-fifth that of the United States.

Extracts from the decision

The English translation is from The John Marshall Journal of Practice and Procedure (Vol. 9:605). Bracketed comments are added. The translation of the full decision is available, as is the original German version.

"Abortion is an act of killing"

The interruption of pregnancy irrevocably destroys an existing human life. Abortion is an act of killing. The description now common, "interruption of pregnancy," cannot camouflage this fact. No legal regulation can pass over the fact that this act offends against the fundamental inviolability and indisposability of human life protected by Article 2, Paragraph 2, Sentence 1, of the Basic Law.

The security of human existence against encroachments by the state would be incomplete if it did not also embrace the prior step of "completed life," unborn life.

Right to Life implies state's duty to foster life

The State's duty to protect forbids not only direct state attacks against life developing itself, but also requires the state to protect and foster this life.

The guiding principle of the precedence of prevention over repression is also valid particularly for the protection of unborn life. It is therefore the task of the state to employ, in the first instance, social, political, and welfare means for securing developing life. The primary concern is to strengthen readiness of the expectant mother to accept the pregnancy as her own responsibility and to bring the child [in the womb] to full life. Regardless of how the state fulfills its obligation to protect, it should not be forgotten that developing life itself is entrusted by nature in the first place to the protection of the mother. To reawaken and, if required, to

strengthen the maternal duty to protect, where it is lost, should be the principal goal of the endeavors of the state for the protection of life. Of course, the possibilities for the legislature to influence are limited. Measures introduced by the legislature are frequently only indirect and effective only after completion of the time-consuming process of comprehensive education and the alteration in the attitudes and philosophies of society achieved thereby.

Prevention is preferable to punishment

The legislature is not prohibited, in consideration of the points of view set out above, from expressing the legal condemnation of abortion required by the [Basic Law](#) in ways other than the threat of punishment. The decisive factor is whether the totality of the measures serving the protection of the unborn life, whether they be in civil law or in public law, especially of a social-legal or of a penal nature, guarantees an actual protection corresponding to the importance of the legal value to be secured. In the extreme case, namely, if the protection required by the constitution can be achieved in no other way, the lawgiver can be obligated to employ the means of the penal law for the protection of developing life. The penal norm represents, to a certain extent, the "ultimate reason" in the armory of the legislature. According to the principle of proportionality, a principle of the just state, which prevails for the whole of the public law, including constitutional law, the legislature may make use of this means only cautiously and with restraint. However, this final means must also be employed, if an effective protection of life cannot be achieved in other ways.

Legal norms and respect for life

The legislature, by repealing the punishability of abortions during the first twelve weeks, deprives prenatal life in the future of the socio-ethical appreciation of its value among people. That penal norms possess power to form the standards of socio-ethical judgment for the citizenry corresponds to proven findings of legal sociology.

The term solution [as in *Roe v. Wade*] would lead to the disappearance of the general awareness of the worthiness of protection of unborn life during the first

three months of pregnancy. It would lend support to the view that the interruption of pregnancy, in any case in the early stage of pregnancy, is as subject to the unrestricted right of disposition of the pregnant woman as the prevention of pregnancy.

Protection of unborn life is in contrast to Nazi legal reasoning

The express incorporation into the [Basic Law](#) of the self-evident right to life -- in contrast to the Weimar Constitution -- may be explained principally as a reaction to the "destruction of life unworthy of life," to the "final solution" and "liquidations," which were carried out by the National Socialistic Regime as measures of state. Article 2, Paragraph 2, Sentence 1, of the [Basic Law](#), just as it contains the abolition of the death penalty in Article 102, includes "a declaration of the fundamental worth of human life and of a concept of the state which stands in emphatic contrast to the philosophies of a political regime to which the individual life meant little and which therefore practiced limitless abuse with its presumed right over life and death of the citizen."

Not only an individual matter

The condemnation of abortion must be clearly expressed in the legal order. The false impression must be avoided that the interruption of pregnancy is the same social process as, for example, approaching a physician for healing an illness or indeed a legally irrelevant alternative for the prevention of conception. The state may not abdicate its responsibility even through the recognition of a "legally free area," by which the state abstains from the value judgment and abandons this judgment to the decision of the individual to be made on the basis of his own sense of responsibility.

Abortion and the right to privacy

The obligation of the state to take the life developing itself under protection exists, as a matter of principle, even against the mother. Without doubt, the natural connection of unborn life with that of the mother establishes an especially unique relationship, for which there is no parallel in other circumstances of life. Pregnancy belongs to the sphere of intimacy of the woman, the protection of which is constitutionally guaranteed through Article 2, Paragraph 1, in connection with Article 1, Paragraph 1, of the [Basic Law](#). Were the embryo to be considered only as a part of the maternal organism the interruption of pregnancy would remain in the area of the private structuring of one's life, where the legislature is forbidden to encroach. Since, however, the one about to be born is an independent human being who stands under the protection of the constitution, there is a social dimension to the interruption of pregnancy which makes it amenable to and in need of regulation by the state. The right of the woman to the free development of her personality, which has as its content the freedom of behavior in a comprehensive sense and accordingly embraces the personal responsibility of the woman to decide against parenthood and the responsibilities flowing from it, can also, it is true, likewise demand recognition and protection. This right, however, is not guaranteed without limits -- the rights of others, the constitutional order, and the moral law limit it. A priori, this right can never include the authorization to intrude upon the protected sphere of right of another without justifying reason or much less to destroy that sphere along with the life itself; this is even less so, if, according to the nature of the case, a special responsibility exists precisely for this life.

A compromise which guarantees the protection of the life of the one about to be born and permits the pregnant woman the freedom of abortion is not possible since the interruption of pregnancy always means the destruction of the unborn life. In the required balancing, "both constitutional values are to be viewed in their relationship to human dignity, the center of the value system of the constitution". A decision oriented to Article 1, Paragraph 1, of the [Basic Law](#) must come down in favor of the precedence of the protection of life for the child [in the womb] over the right of the pregnant woman to self-determination. Regarding many opportunities for development of personality, she can be adversely affected

through pregnancy, birth and the education of her children. On the other hand, the unborn life is destroyed through the interruption of pregnancy. According to the principle of the balance which preserves most of competing constitutionally protected positions in view of the fundamental idea of Article 19, Paragraph 2, of the [Basic Law](#), precedence must be given to the protection of the life of the child about to be born. This precedence exists as a matter of principle for the entire duration of pregnancy and may not be placed in question for any particular time.